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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MADELYN MORENO,

Defendant and Appellant.

A154580

(Napa County Super. Ct. Nos.
CR179974 & CR182854)

Appellant Madelyn Moreno appeals from a judgment following a contested probation violation hearing. She challenges the trial court’s imposition of a “flash incarceration” probation condition (Pen. Code, § 1203.35, subd. (b)),¹ and of certain fines and fees.² We reverse and remand the flash incarceration probation condition, and reject appellant’s challenge to the fines and fees.

BACKGROUND

In 2016, in Case No. CR179974, appellant pled no contest to corporal injury to a person with whom she had been in a dating relationship (§ 273.5, subd. (a)). The court

¹ All undesignated section references are to the Penal Code.

² Appellant’s counsel initially filed a brief raising no issues pursuant to *People v. Wende* (1979) 25 Cal.3d 436. After independently reviewing the record, we requested supplemental briefing on the flash incarceration probation condition and subsequently granted appellant’s motion to also brief the fines and fees issue. Our review of the record revealed no additional arguable issues.

suspended imposition of sentence and placed her on formal probation for three years. In 2017, in Case No. CR182854, appellant pled no contest to assault with a deadly weapon (§ 245, subd. (a)(1)). The court suspended imposition of sentence and placed her on formal probation for three years. Probation in Case No. CR179974 was revoked and reinstated.

In 2018, the People filed revocation petitions in both cases, alleging appellant failed to obey all laws and violated Health and Safety Code section 11550, subdivision (a) (misdemeanor use of certain controlled substances, including methamphetamine). After a contested evidentiary hearing, the trial court found the allegations true. In Case No. CR179974, probation was revoked, reinstated, and modified to authorize flash incarceration for future probation violations. In Case No. CR182854, probation was revoked, reinstated, and modified to add the condition that appellant serve 328 days in county jail. This appeal followed.

DISCUSSION

I. Flash Incarceration Condition

Flash incarceration is defined by statute as “a period of detention in a county jail due to a violation of an offender’s conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days.” (§ 1203.35, subd. (b).) The statute further provides: “In any case where the court grants probation . . . , the county probation department is authorized to use flash incarceration for any violation of the conditions of probation . . . if, at the time of granting probation . . . , the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration. Probation shall not be denied for refusal to sign the waiver.” (§ 1203.35, subd. (a)(1).)

As the People properly concede, the trial court failed to obtain the required waiver before imposing the flash incarceration provision and a limited remand is appropriate to permit the court to either obtain such a waiver or strike the condition. We will so order.

II. *Fines and Fees*

At appellant's 2016 sentencing, the court imposed certain fees and fines. Appellant now challenges the imposition of these fees and fines without consideration of her ability to pay.

Appellant's belated attempt to challenge orders issued in a now-final judgment is unavailing. "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Similarly, appellant cannot challenge fines and fees imposed when probation was granted in her current appeal from a judgment following revocation of probation.

DISPOSITION

The judgment is reversed and remanded for the superior court to either obtain the waiver required to impose the flash incarceration condition or strike the condition. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P. J.

BURNS, J.

(A154580)